1969

First Security Bank of Utah, National Association v. Ezra C. Lundahl, Inc., E. Cordell Lundahl, Shyrleen B. Lundahl, Ezra C. Lundahl and Leatha A. Lundahl : Brief of Respondent

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Olson and Hoggan and Ray, Quinney, and Nebeker; Attorneys for Plaintiff-Respondent

In the Supreme Court of the State of Utah

FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION,
Plaintiff and Respondent,

vs.

EZRA C. LUNDAHL, INC., E. CORDELL LUNDAHL, SHYRLEEN B. LUNDAHL, EZRA C. LUNDAHL and LEATHA A. LUNDAHL,
Defendants and Appellants.

Civil No. 11359

BRIEF OF RESPONDENT

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, Judge

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STATEMENT OF THE NATURE OF THE CASE

This action was commenced by plaintiff bank to recover from its customer the amount of an overdraft created by a charge-back of a foreign check which was sent for collection but returned unpaid by the payor bank, with a counterclaim by the customer growing out of a prior transaction.

DISPOSITION IN LOWER COURT

After trial before Honorable Lewis Jones, District Judge, sitting with a jury, special interrogatories were returned with findings against plaintiff on some of the issues. The court made its own findings on remaining

issues of fact and law, and rendered judgment for plaintiff with an offset for a judgment in favor of defendants on their counterclaim.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment granted to plaintiff against defendants.

STATEMENT OF FACTS

Plaintiff agrees with most of the facts stated in appellant's brief but adds the following statements controverting or clarifying appellants' statement.

The check of Heathfield Equipment, Ltd. in the amount of $8,121.88 deposited by Ezra C. Lundahl, Inc. on July 28, 1966, (sometimes referred to as Check One) was charged-back to the account on August 1, 1966, (Exhibit D-17) and in accordance with the usual practice, notice thereoff was sent to Lundahls' accountants, but it was denied that the accountants or Lundahls had notice of the return of said check until after the monthly bank statement was recieved (Tr. 49, 50). Thereafter, the Bank collected from Lundahls the amount of the overdraft created by that charge-back. On the initial deposit of said item, it was not designated as a "foreign item" even though it was drawn on the Royal Bank of Canada, as a result of which it was returned with instructions to enter it for collection (Exhibit D-17 and Tr. 449). The jury determined that the Bank was neg-

ligent on that check when it failed to identify it as a foreign item, and further when it failed to notify Lundahls about the overdraft caused by the loss of the first check (Rec. 44). On this basis, judgment was entered on the counterclaim against plaintiff in the amount of $893.93.

Subsequently, another check was obtained from Heathfield Equipment, Ltd. in the amount of $8,100.00 which was received November 15, 1966, but postdated because the money was not yet available (Exhibit P-4). The check was deposited December 5, 1966, with the specific notation that it was for collection only (Exhibits P-11 and P-3). A credit was given to the account of Ezra C. Lundahl, Inc. with plaintiff Bank (Exhibit P-3). This check is sometimes called Check Two. Said check was drawn on the Royal Bank of Canada, Kanloops, B.C., and by letter of December 9, 1966, said bank advised plaintiff that the check was dishonored for nonsufficient funds but that the check would be held for payment unless otherwise instructed. The Bank subsequently notified Lundahls of the dishonor of the check (Finding No. 8 and Tr. 21, 22), although the jury determined that the notice of dishonor was not given within the time prescribed by law (Rec. 44). This Second Check is really the only issue on appeal.

On February 13, 1967, while the check was still being held for collection at the Royal Bank in Canada,

Ezra C. Lundahl, realizing that the check in Canada had not yet been paid, withdrew $7,000.00 from the corporate account because he didn't want the plaintiff Bank "to glom onto" the money (Tr. 206, Exhibit 14 and Finding No. 12, Rec. 71). The check was thereafter returned unpaid and received by plaintiff February 16, 1967 (Exhibit P-10). While the check was pending for collection, the Lundahls knew or should have known of the financially insolvent condition of Heathfield Equipment, Ltd. and the unavailability of money to pay the check (Tr. 297 and Finding No. 5, Rec. 69). Lundahls had requested the Bank to maintain the check in Canada so that it could be paid when funds were available for collection (Finding No. 9, Rec. 70). Immediately upon receipt of the unpaid check, plaintiff attempted to contact the Lundahls and on February 17th, advised Cordell Lundahl of the return of the check (Tr. 32). The actual chage-back was entered on the next business day, Monday, February 20, 1967 (Tr. 34 and Exhibit P-12).

Other relavant facts are stated in argument.

STATEMENT OF POINTS

POINT I

The plaintiff bank was the agent of the customer Lundahl and granted a provisional credit on December 5, 1966, which did not become final.

POINT II

A provisional credit is subject to a charge-back by the depositary bank if the check is dishonored by the payor.

A. The right to charge-back is not affected by prior use of funds available from the provisional credit.

B. Any negligence of the bank is no bar to the bank's right of charge-back.

POINT III

The provisions of the commercial code covering bank collections do not apply in cases of unjust enrichment.

POINT IV

The court did not preclude itself from making the final decision in the case, not only as to the law, but as to facts not passed upon by the jury.

POINT V

The accord and satisfaction on January 4, 1967, did not include Check Two.

ARGUMENT

POINT I

THE PLAINTIFF BANK WAS THE AGENT OF THE CUSTOMER LUNDAHL AND GRANTED A PROVISIONAL CREDIT ON DECEMBER 5, 1966, WHICH DID NOT BECOME FINAL.

Under the Uniform Commercial Code, which has been in effect in the State of Utah for three years, the legal status of banks and other parties in banking transactions is clarified by the use of specific descriptive terminology. (Unless otherwise specified herein, all statutory references are to Utah Code Anno., 1953 as amended). In the case at bar, First Security Bank of

Utah, N.A. occupies the position of "depositary bank" because it is the first bank to which the $8,100.00 check in question was transferred for collection (Section 70A-4-105 (a)). This bank is also the "collecting bank" because it handled the item for collection (Section 70A-4-105 (d)) and expected remittance in payment of the item from the "payor bank", the Royal Bank of Canada (Section 70A-4-105 (b)). Appellant Ezra C. Lundahl, Inc. is the "customer" having the account with the Bank and for whom the Bank agreed to collect the item (Section 70A-4-104 (e)). Of considerable initial importance are the following provisions of Section 70A-4-201 (1):

> (1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is, or becomes final (sub-section (3) of section 70A-4-211 and sections 70A-4-212 and 70A-4-213) the bank is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawel as of right or is in fact withdrawn;...
>
> A prominent commentator has expressed it in this manner:
>
> Collecting banks, whether the first, strictly an intermediary or the presenting bank, are agents of the owner of an item Their responsibility is to act in the customer's behalf; they undertake no liability as owners themselves (Section 4-201 (1)).

> A bank may become an owner where this is the clear intent of the parties and the endorsement permits such ownership. See Section 4-201 (1), (2). This is the exception and not the rule. Thus, risk of loss of the item and of bank insolvency is on the owner and federal deposit insurance recovery is measured by his, not the collecting bank's, rights. Bender's Uniform Commercial Code Commentary, Vol. 4, Section 43.03.

Respondent submits that by reason of the legal status of the bank as the collecting agent for the customer, any credit given to the customer's account is "provisional", or revocable if any final payment is not received. The right of the bank to charge-back a returned and unpaid item is made clear throughout the entire Uniform Commercial Code, and indeed throughout the common law in effect prior to adoption of the Code. Commercial requirements of the banking community dictate that a customer for whom collection is intended bears the risk of loss if the deposited item is returned unpaid by the payor bank. Any loss from non-payment must be assumed by the principal, not the agent This well-established concept of agency in the context of a banking transaction clearly supports respondent's reasoning that the first credit given by the depositary bank to the customer is a *provisional credit.* The statute above cited requires such result. Being provisional, the credit is subject to a charge-back in the event the item is unpaid and is subject to becoming

final in the event the depositary bank receives remittance in payment of the item.

Translated into the facts of this case, it is easily discerned that the check of Heathfield Equipment, Ltd. dated December 5, 1966, in the amount of $8,100.00 (Exhibit No. P-11) is the item which was deposited. The reverse side of that check quite regularly and unquestionably indicates by the ink stamped endorsement of the Bank that it was "for collection only". The deposit slip bearing the same date and referring to said item (Exhibit P-3) also states that it was for "cash collection". It is thus established that the bank was acting only for and on behalf of its customer Ezra C. Lundahl, Inc. in granting a provisional credit, with no liability for the item other than the responsibility to use ordinary care (Section 70A-4-202). The provisional nature of the credit is further defined in the contract between the parties (account signature card Exhibit P-1) which provides specifically that the Bank acts only as agent for the customer with the responsibility of exercising due care, and that all items are credited subject to final payment in cash or solvent credit.

The credit was not available for withdrawal as of right because the settlement had not yet become final (Section 70A-4-213 (4)) Nevertheless, the amount of the credit was at least partially withdrawn on February 13, 1967 (Tr. 206 and Exhibit 14). This factual struc-

ture is consonant with those portions of Section 70A-4-201 providing far agency of the bank and a provisional credit even though the credit "is in fact withdrawn", as well as being consonant with Section 70A-4-212 (4) (a) declaring that "The right to charge-back is not affected by (a) prior use of the credit given for the item;".... Notwithstanding the clarity of the statutes and the smooth accommodation thereto of the facts of this case, Appellant has labored an argument to the effect that the provisional credit became final because of a delay on the part of the bank. *No statutory provision or legal decision can be cited to support such position.* Indeed, the Code sets forth the only conditions under which a provisional settlement may become final:

> Section 70A-4-213 (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) *paid* the item in *cash;* or
>
> (b) settled for the item without reserving a right to revoke the settlement... ;*or*
>
> (c) completed the process of posting the item to the indicated account of the *drawer,... ; or*
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule or agreement.
>
> (2) If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits, or credits in an account between them, then to the extent

that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(3) *If a collecting bank receives a settlement* for an item which is or becomes final (subsection (3) of section 70A-4-211, subsection (2) of section 70A-4-213) the bank is accountable to its customer for the amount of the item and *any provisional credit given for the item in an account with its customer becomes final.*

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right.

(a) in any case where the bank has received a provisional settlement for the item, — when *such settlement becomes final* and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the *bank is both a depositary bank* and a payor bank and the item is finally paid, — at the opening of the bank's second banking day following receipt of the item. (Emphasis added)

Under the facts of the case at bar it cannot be denied that none of the conditions specified above as creating a final settlement has occured. The consequences of the delay of the collecting bank, if any, do not give rise to any *final settlement* of a provisional credit

for an item which is never paid!

In further support of the notion that the December 5, 1966 check was not finally paid, the following comments are of interest:

> "The concept of final payment is central to the scheme of Article 4 because the time of final payment of a check or similar item is the starting point for determining the rights and obligations of a number of parties in relation to an item. When final payment occurs, the payor bank is deemed to be accountable to the presenting party for the amount of the item. At the same time the drawer of the instrument is relieved of liability to the holder because the amount is deemed to have been paid. Also, if the payor bank becomes insolvent and suspends payment once final payment has occured, the owner of an item will have a preferred claim against the payor bank for the amount. Final payment, futhermore, is one of the occurrences which can prevent the "four legals" — notice, stop-order, legal process and setoff — from being effective to prevent actual payment of the item. Provisional settlement, the credit given by the payor bank to the party presenting an item for collection, becomes final when final payment is made, as does credit for the item between the presenting bank, other collecting banks and the customer seeking payment for the item. Final payment, moreover, marks the end of the collection process and the beginning of the remitting process, whereby the amount of the item is returned to the party demanding payment." (Note, Bank Procedures and the UCC — When is a check finally paid?, Boston College Industrial Com-

mercial Law Review, Volume IX, Number 4, Page 957.)

None of the legal consequences described in the above practical analysis of the effect of final settlement ever existed in the transaction here involved. Lundahl simply has no basis whatever for asserting that the check was finally settled.

An interesting judicial decision which supports respondent's position by analogy is *West Side Bank vs. Marine National Exchange Bank,* 37 Wis. 2d 661, 155 N.W. 2d 587 (1968). There the court was concerned with the question of final settlement of the check by reason of the "completed posting" provision of Section 4-213 (1) (c) and Section 4-109. The payor bank stamped the check "paid", charged the drawers account, photographed, cancelled and filed the item in the drawers account. Hours later, the drawer issued a stop-payment-order after which the payor bank withdrew the check from its files, reversed all the entries and returned the check to the collecting bank through the Clearing House. The collecting bank argued, of course, that the check had been "paid" because of the final posting, and the return of the check was unwarranted. The court held that the payor bank was not accountable for the item because the process of posting was not complete until a decision was made that entries would not be reversed or corrected, and this decision need not be made until the time to return an item has expired, i.e.

the midnight deadline of the next business day.

Respondent herein believes that the liberality of the court in permitting return of an unpaid check, and the consequent rights of charge-back to the customer's account at the collecting bank, is an essential extention of the commercial requirements whereby collecting bank is merely on agent of the depositor and assumes no risk of loss.

POINT II

A PROVISIONAL CREDIT IS SUBJECT TO A CHARGE-BACK BY THE DEPOSITARY BANK IF THE CHECK IS DISHONORED BY THE PAYOR.

A. THE RIGHT TO CHARGE-BACK IS NOT AFFECTED BY PRIOR USE OF FUNDS AVAILABLE FROM THE PROVISIONAL CREDIT.

Viewed against the foregoing background of agency and provisional credits, the statutory right of charge-back fits directly into the pattern. Section 70A-4-212 provides in pertinent parts:

> "(1) *If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge-back the amount of any credit given for the item to its customer's account* or obtain refund from its customer wheteher or not it is able to return the items if by its midnight dead-

line or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final (subsection (3) of section 70A-4-211 and subsections (2) and (3) of section 70A-4-213).

(4) *The right to charge-back is not affected by*

(a) *prior use of the credit given for the item;* or,

(b) failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable." (Emphasis added)

There is no question whatever that the bank made a provisional settlement on December 5, 1966, and that it failed by reason of dishonor to receive a final settlement for the item from the payor bank (Finding No. 7, Rec. 70). Therefore, the bank had the clear right to charge back to the customer's account the amount of credit previously given for the item when it was finally returned unpaid in February, 1967.

Of critical importance to the issues before this court is the plain statutory rule that the right to charge back is not affected by prior use of the credit given for the item or failure of the bank to exercise ordinary care with respect to the item. With regard to the last stated provision, it appears clear that the defendants claimed no damages with respect to the $8,100.00 of December

5, 1966, as a result of which no issue exists with respect thereto. We are left with two issues under the provisions of 70A-4-212: (1) The effect of the prior use of the credit given for the item by reason of the withdrawal by the Lundahls of $7,000.00 on February 13, 1967; and (2) failure of the bank to exercise ordinary care with respect to that particular item.

Much discussion is entertained in appellant's brief regarding the difference between the right of refund and the right of charge back. Respondent submits that all of such argument is meaningless under the proper interpretation of governing law as applied to the facts of this case. *The very wording of Section* 70A-4-212 (4) (*a*) *grants the right of charge-back notwithstanding prior use of credit given for the item.* Appellant Ezra C. Lundahl, Inc. made prior use of part of the credit given for the item by its withdrawal of $7,000.00 on February 13, 1967. Such use does not affect the Bank's right to charge-back the returned check one week later after it had received unpaid from the payor bank. Appellant's attempt to characterize this transaction as a "refund" has no real relevance to the case by reason of that statutory wording.

Highlighting the distinction between "charge-back" and "refund" we bring tothe court's attention the very definition of a "customer" which includes a person having an account with a bank, as in the case here, as

well as a person "for whom a bank has agreed to collect items" (Section 70A-4-104 (1) (e)). A bank seeking a *refund* against a customer would include a bank which *cashed a check* or otherwise extended credit for a collection item to someone not utilizing an account with the bank, but who is a "customer" nevertheless because the bank agreed to effect collection of the item for him. In such case, the bank would clearly have no right to charge-back a returned item to any account. This is distinguishable from the case at bar where the defendant Ezra C. Lundahl, Inc. maintained an account and the right of charge-back was not affected by the fact that a substantial portion of the money was withdrawn from the account prior to the date of charge-back. The overdraft thus created which forms the basis of plaintiff's complaint is still a very different kind of transaction than obtaining a refund from a non-account-holding "customer" who utilized no account which might be subject to the charge-back. This Court will not be confused by appellant's attempt to complicate a statutory provision which is simple in the wording of Section 70A-4-212 (4) (a).

The following comments from Anderson's Uniform Commercial Code, Volume 2, may be helpful.

> The right to charge-back or obtain a refund from its customer is a cumulative or additional remedy of the collecting bank. The fact that it fails to exercise such right, or fails to do so within the time required by the code, is imma-

terial with respect to and does not affect any other right which it has against the customer or any other person. (Anderson, Section 4-212:3)

The right of the collecting bank to charge back is not affected by the circumstances that the customer has made a prior use of the credit given for the item. Nor is it affected by the fact any bank in the chain of collection, including even the depositary bank, failed to exercise ordinary care with respect to the item. Conversely, any bank which has been negligent remains liable for its negligence and such liability is not affected by the existence of the right of charge-back.

When a customer's bank has permitted the customer to withdraw the amount of the credit given for a deposited check, the bank may charge back against the depositor's account the amount of such check if because of the drawer's stopping payment thereof, the customer's bank is not able to collect the check. *Pazol v. Citizens National Bank,* 110 Ga. App. 319, 138 S.E. 2d 442. (Anderson, Section 4-212:5)

B. ANY NEGLIGENCE OF THE BANK IS NO BAR TO THE BANK'S RIGHT OF CHARGE-BACK.

In response to the Court's special interrogatories which covered some of the issues in the case, the jury determined that the Bank was negligent in not notifying Lundahl of the nonpayment of the December 5th check in the time prescribed by law (Rec. 44). Reference is made to Exhibit P-6 wherein the Royal Bank of Canada specifically advised First Security Bank that the check

would continue to be held for payment. It is also clearly made a finding that the Bank did keep the Lundahls advised of the status of the check at the Royal Bank of Canada and of its nonpayment (Findings No. 8). The latter finding is amply supported by evidence. An officer of the Bank testified of numerous occasions in which the status of the unpaid check was discussed with the Lundahls (Tr. 21, 22).

In the appellant's brief it is claimed that the lower court did not understand the impact of its findings, for a contradiction in terms is claimed. Apparently, the argument is that because the jury found that the Bank did not give notice of the dishonor of the check on December 9th when Exhibit P-6 was received, or within the midnight deadline thereafter, then any further notice given by the Bank should not be counted. Such an argument is clearly untenable. Section 70A-4-212 (4) (b) clearly states that the right to chage-back is not affected by failure of the bank to exercise ordinary care, In Comment 5 to the section from the 1962 official text of the National Conference of Commissioners on Uniform State Laws, we quote:

> "5. The rule of subsection (4) relating to charge-back (as distinguished from claim for refund) applies irrespective of the cause of the nonpayment, and of the person ultimately liable for nonpayment. Thus, charge-back is permitted even where nonpayment results from the depositary bank's own negligence. Any other rule

> would result in litigation based upon a claim for wrongful dishonor of other checks of the customer, with potential damages far in excess of the amount of the item. Any other rule would require a bank to determine difficult questions of fact. The customer's protection is found in the general obligation of good faith (Sections 1-203 and 4-103). If bad faith is established the customer's recovery "includes other damages, if any, suffered by the party as a proximate consequence" (Section 4-103 (5); see also Section 4-402)."

Respondent submits that the lower court's findings herein that the Bank kept Lundahl fully informed as to the status of the check goes directly to the question of "good faith" of the Bank. The customer is protected in the right of charge-back notwithstanding negligence of the bank because the bank is still the agent of the customer and if the bank acts in good faith, it has the unconditional right to charge-back an unpaid check, and thus reverse the provisional credit Indeed, the good faith of the customer is brought into question when the court specifically concluded that "the customer knew or should have known that the drawer of the check was in unsound financial straits and either insolvent or on the verge of insolvency." (Rec. 73, Conclusion No. 2). We also observe that the testimony of Mr. Heathfield to the effect that the Bank could have paid the check in question is totally meaningless in view of the fact that the Royal Bank of Canada held the check for the specific purpose of obtaining pay-

ment thereon, and after the check was returned unpaid by letter of February 10, 1967, (Exhibit P-10) the Royal Bank subsequently explained that Heathfield was in no financial condition to pay the check at any time during the period it had been held (Exhibit P-28).

At Page 41 of appellant's brief, the case of *Rock Island Auction Sales Inc. vs. Empire Packing Company,* 32 Ill. 2d 269, 204 N.E. 2d 721, 18 ALR 3d 1368 (1963) is discussed, but appellant misconstrues the impact of that decision. In that case, the *payor* bank held a check beyond its midnight deadline because its depositor, the drawer of the check, assured the bank that funds would be deposited to cover the item Such is precisely the case here with the Royal Bank of Canada. The Illinois Supreme Court, however, specifically stated that the collecting bank is in a different legal status:

> "... Depositary and collecting banks act primarily as conduits. The steps that they take can only indirectly affect the determination of whether or not a check is to be paid, which is the focal point in the collection process. The legislature could have concluded that the failure of such a bank to meet its deadline would most frequently be the result of negligence, and fixed liability accordingly. *The role of a payor bank in the collection process, on the other hand, is crucial. It knows whether or not the drawer has funds available to pay the item.* The legislature could have considered that the failure of such a bank to meet its deadline is likely to be due to factors other than negligence, and that the

> relationship between a payor bank and its customer may so influence its conduct as to cause a conscious disregard of its statutory duty. The present case is illustrative. The defendant, in its position as a payor bank, deliberately aligned itself with its customer in order to protect that customer's credit and consciously disregarded the duty imposed upon it" (Emphasis added)

We are not concerned in this action, unfortunately, with a claim for relief against the Royal Bank of Canada. That bank's action was crucial. First Security Bank, on the other hand, acted in good faith and did not take or omit any action which was detrimental to the interests of Lundahl.

By reason of all of the foregoing considerations, respondent Bank herein was clearly entitled to charge-back the returned item of $8,100.00 in February, 1967, and to recover from Lundahl the amount of the overdraft created thereby.

POINT III

THE PROVISIONS OF THE COMMERCIAL CODE COVERING BANK COLLECTIONS DO NOT APPPLY IN CASES OF UNJUST ENRICHMENT.

ARGUMENT

The lower court made a specific finding that Lundahl had been and would continue in the future to be unjustly enriched unless compelled to make repayment to the bank on the $8,100.00 check for which it had re-

ceived credit from Plaintiff and used the money therefrom, but which check was never honored or paid by either the drawee or drawer. (Finding of Fact 17) In other words, if Lundahl were allowed to keep the full $8,100.00 which Plaintiff had kindly advanced to Lundahl on the basis of the anticipated collection of the $8,100.00 check, but which in fact was never collected, Lundahl would be unjustly enriched at the expense of Plaintiff, who had come to Lundahl's aid and assistance.

Based on this finding, the lower court concluded that the provisions of the Commercial Code are not applicable where the bank customer solicits the aid and assistance of the bank in securing and collecting a post-dated replacement check issued to cover a prior lost check, where the customer knew or should have known that the issuer of the check was in unsound financial straits and either insolvent or on the verge of insolvency. (Conclusion of Law 2, R. 73)

The Commercial Code recognizes situations where the technical provisions of the Code should not apply. Section 70A-4-212, UCA, 1953 Replacement, Right of Charge-back or Refund, Subsection (5) provides:

> "(5) A failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party."

This is all in accord with the basic, fundamental rule of Restitution:

American Law Institute, Restatement of the Law, Restitution:

"Section 1. Unjust Enrichment.

A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

"Comment:

a. A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust. A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received, but as stated in Comment e, if the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment.

b. *What constitutes a benefit.* A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, or in any way adds to the other's security or advantage *He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss.* The word "benefit" therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives

thereby a greater chance of living."

Section 4. Remedies:

In situations in which a person is entitled to restitution, he is entitled, in an appropriate case, to one or more of the following remedies:

(a) * * * (e)

(f) a judgement at law or decree in equity for the payment of money, directly or by way of set-off or counterclaim.

Section 5. Forms of Action.

The appropriate proceedings in an action at law for the payment of money by way of restitution is:

(a) * * * (b)

(c) in States which have statutes providing for the abolition of the distinctions between forms of action, an action in which the facts entitling the Plaintiff to restitution are set forth.

The facts of this case support the Court's Finding and Conclusion. A chronicle of the pertinent facts are:

1. Check one was lost through no fault of the Plaintiff bank, but either in transit or by Lundahl's agent. (Finding of Fact 3, R. 74, and jury's Answer to Special Interrogatory 2, R. 44) which recognizes the loss of check one, but makes no finding of negligence against the bank regarding said loss, thus accepting the bank's evidence showing a transmittal of the check one to Lundahl's agent Tr. 241-246)

2. A most difficult time was had by the Lundahls

in securing a replacement check from Heathfield, and the bank, at Lundahl's request, aided materially in securing the Check Two in place of Check One. (Findings of Fact 4 and 5, Tr. 234-235, and Ex. 18, Letter Bank to Heathfield, Ex. 25 Letter Heathfield to Bank.)

3. Check Two, when finally issued by Heathfield to cover lost Check One, was postdated. (Findings of Fact 5, R. 69, Ex. 4 Letter of Transmittal from Heathfield to Lundahl explaining reason for post-dating and Lundahl's prior knowledge of circumstances.)

4. That during this time and continuing on for the duration of time herein involved, Heathfield was in unsound financial condition and its checking account subect to almost continuous overdraft. That Lundahl knew of this, or should have been well aware of this. (Findings of Fact 5; Ex. 25, which is Heathfield's bank statements for the year 1966; Ex. 4, 6, 7, 8, 9, 10, and 25, which are all letters; Tr. 158 to 185, inc. the testimony of Harvey C. Heathfield

5. That between the date, to-wit: February 10, 1967 (Ex. 10) when the Royal Bank of Canada returned Check Two to Plaintiff, and its receipt by Plaintiff on February 16, 1967, (Tr. 31), Lundahl withdrew the sum of $7,000.00 from its account. (Finding of Fact 12; Tr. 217-218, Tr. 222-223) In the deposition of Ezra C. Lundahl he refused to answer why said withdrawal was made, then in answer to written interrogatories

he gave one reason for withdrawing the money, and during testimony at the trial he gave other reasons. (Findings of Fact 13; Tr. 217-218, Tr. 222-223). The lower Court made a Finding (Number 13) that said withdrawal was not made in good faith.

6. That notwithstanding the assertion of Harvey G. Heathfield that Heathfield had a continuing line of credit up to $60,000.00 with the Royal Bank of Canada, for some unexplained reason the Royal Bank of Canada did not honor the Second Check even though it held possession of said unpaid check for over two months, thus contributing to the overall picture of bad faith dealings or arrangements between Lundahls, Heathfields, and Heathfield's bank. (Tr. 172-178, 181-182).

7. That the withdrawal of $7,000.00 by Ezra Lundahl from the Corporate account on February 13, 1967 was made just a few days before Check Two was returned unpaid leaving insufficient funds in the account to cover the check when it returned and at a time when Cordell Lundahl was in Canada and had discussed the second check with Ezra Lundahl, all the while professing to know nothing about Heathfield's inability to pay it.

Based on the above law and facts, the lower court determined that the technical rules governing bank collections were not applicable. And to prevent an unjust enrichment in favor of Lundahl, who acted in bad faith,

at the expense of the Plaintiff bank, who went out of its way to assist its customer's attempt to get out of a sticky matter, only to have the customer turn on the bank and attempt to "stick" it for the $8,000.00, the Court allowed Plaintiff to recover its out-of-pocket expenditure made to benefit the customer.

The Court ruled that the Plaintiff bank was entitled to recover the $8,100.00 it had advanced to Lundahl, less only what it had recouped on the charge-back, less damages as fixed by the jury for its negligence. In all other respects, the Plaintiff bank gave timely notice and kept Lundahl fully advised in all respects. (Findings of Fact 8)

On this theory of restitution alone, to prevent unjust enrichment, Plaintiff is entitled to an affirmance of the lower courts decision.

POINT IV

BY SUBMITTING A SPECIAL VERDICT AND INTERROGATORIES TO THE JURY, THE COURT DID NOT PRECLUDE ITSELF FROM MAKING THE FINAL DECISION IN THE CASE, NOT ONLY AS TO THE LAW, BUT AS TO FACTS NOT PASSED UPON BY THE JURY.

ARGUMENT

Appellant takes the position that the Court, having submitted the case to the jury upon a special verdict

and interrogatories was thereafter precluded from further participation in the case. Appellant argues that the jury having answered four questions, this disposed of the lawsuit and that the Court had nothing further to do but render a general verdict for Defendants.

This view of appellants is not in accord with Rule 49, Utah Rules of Civil Procedure, Special Verdicts and Interrogatories.

Rule 49 reads:

RULE 49

SPECIAL VERDICTS AND INTERROGATORIES

(a) *Special Verdicts*: The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In the event the Court may submit to the jury written interrogatories susceptible of categorical or other brief answers or may submit written forms of several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the Court

> may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

By the plain terms of this Rule, each party waives his right to a jury trial on any issue of fact not submitted to the jury. And, as to issue omitted, the Court may make a finding.

The Court has control of the case during the trial. *Hanks* vs. *Christensen,* (1960) 11 U. (2d) 8, 354 P(2d) 564. In exercising this control, the Court may submit the case to a jury upon: (1) a general verdict; (2) a special verdict or interrogatories; or (3) a combination of interrogatories with a general verdict. Here, the Court chose method (2).

> "The function of the special verdict is to secure a findings from the jury upon each question of ultimate fact litigated as distinguished from a general verdict by which the jury finds upon all the issues" Hughes Federal Practice, Jurisdiction and Procedure, Vol. 18, Section 24302, page 319.

Utah Rule 49 (a) is modeled from Federal Rule 49 (a).

And, at this point, it is well to emphasis a factor that appellant insists on ignoring, which is that in setting out in detail, in answer to question 2 submitted to the jury, just how and in what respects Plaintiff-Respondant was negligent, the jury was likewise making a finding as to *no* negligence and a proper performance

on the part of plaintiff-bank in handling the multiple transactions it was requested to assist defendant-appellant with in this matter.

An example of this is Defendant-Appellant's insistence on claiming, notwithstanding there was *no* finding by the jury in their favor on this, that the Plaintiff-Respondent lost the first check, did not give notice to Defendant-Appellant of the charge-back on it and did not return the check to them. The record is extremely clear on the procedure followed by the bank in returning this check (check one) to Lundahl's agent and that the agent received it ,(Tr. 241-246, 256-261, 261-262), and obviously both the Court and the jury elected to believe this evidence. The jury detailed *no* finding of negligence in this respect and the Court specifically found that check one was either lost in transit *after* being mailed out, together with a charge-back slip, by the bank, or lost after receipt by Lundahl's agent. In either event, this was no fault of the bank, nor a result of its failure to act properly.

Quoting further from Hughes, Vol. 18, Section 24302, page 320:

> "By submission of a special verdict it is contemplated that the jury be required to answer the questions submitted to them upon the evidence and in accordance with the instructions of the Court. It is no part of the jury's function to determine what effect its answers will have upon the final outcome of the trial."

In summary, what the Court did here was to ask the jury to answer four questions concerning factual matters. The Court did not, nor did the parties, request a general verdict from the jury. This left the ultimate decision in the case, together with determination of all factual issues not submitted to the jury, up to the Court. Actually the Court spelled this out in submitting the interrogatories to the jury, by telling them that the Court was going to make the ultimate decision on the Plaintiff's case and the question of the guarantee. (Tr. 220, 267-268)

And the Court further spelled out at that time that there were other questions he could submit to the jury, but chose not to. (Tr. 268)

In short, the Court followed the proper procedure in making its own findings on omitted issues, and in applying the law correctly to all of the facts as found by the jury Court. That the Court committed no error in its decision is shown in other phases of this brief.

POINT V

THE ACCORD AND SATISFACTION ON JANUARY 4, 1967, DID NOT INCLUDE CHECK TWO.

ARGUMENT

The trial court submitted the question of an accord and satisfaction between Plaintiff-Respondant and Defendant-Appellant as of January 4, 1967, to the jury.

The jury found an accord and satisfaction as of that date, which finding the Court approved and accepted. Finding of Fact 15 and 16, and Conclusion of Law 1.

The Court found, however, that said accord and satisfaction made on January 4, 1967, did not include Check Two, and rightly so. Check Two was not even returned unpaid to the Plaintiff bank until long after January 4, 1967, to-wit: on February 16, 1967.

Prior to January 4, 1967, all concerned considered that Check Two would be paid (Tr. 57), and Hesston Corporation, who entering into a contract (Ex. D-19) with Lundahl which provided for the payment of Lundahl's obligation, was so informed. (Tr. 77-79)

It was not until *after* January 4, 1967, and actually in February, on or about the 9th or 10th thereof, that it became apparent that Check Two would *not* be paid.

It is difficult to see how an accord and satisfaction as of one date would cover a liability that was not made known until a later date. Actually, if Defendants-Appellants arguement in this respect is accepted, i.e.: That Hesston contract applied not only to the items listed on Exhibits 21 and 23, to-wit: the notes and contracts then outstanding, but settled everything between the bank and Lundahl, then it would apply to the bank accounts held by the Lundahls at that time with the bank wherein a debtor-creditor relationship

existed, and the bank would be entitled to claim an amount from the Lundahls totaling the sum of all moneys in deposit on said day. The Court excepted the day-to-day bank accounts from the accord and satisfaction (Conclusion of Law 1) and Lundahl does not quarrel with this exception, they only want to quarrel with the exception which hurts them and leave standing the exception which helps them.

> "Accord and satisfaction is a method of discharging a contract or cause of action, whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the "accord" being the agreement and the "satisfaction" is execution or performance." *Fair child* vs. *Mathews* (Idaho, 1966) 415 P (2d) 43.
>
> In Fairchild, the Idaho Supreme Court went on to say: (Page 46 of 415 P (2d)
>
> "To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed."
>
> And further on, at the same page:
>
> "In order for the acceptance of a check to amount to an accord and satisfaction, where it is for a lesser sum that is claimed by the creditor to be due, the conditions must be made plain, definite and certain by the debtor that he is

> giving such check in complete settlement and satisfaction of all accounts between him and his creditor and that acceptance thereof shall close the account or controversey. Also an accord and satisfaction cannot arise by reason of the payment of less than is due, unless it clearly appears not only that this was the intention of the payor, but also that the payee expressly agreed to it, or was bound to know of the intention at the time of the acceptance; in effect, that his taking of a check would be tortious except upon the assumption of a taking in full satisfaction. It cannot be too strongly stated that an accord and satisfaction can never be implied from language of doubtful meaning; indeed, the words themselves deny this possibility. Hence, where a substantial doubt arises, there can be no such application, the usual rule applies, and the payment will be treated as on account only."

Applying this law to the existing facts, it certainly appears that the accord and satisfaction of January 4, 1967 *did not* and *could not* include the Second Check.

Lundahl in one breath says that the amount of money paid by them to the bank on January 4, 1967, pursuant to the Hesston agreement and Exhibit 21 and 23 discharged their liability to the bank under Check Two, which was not even mentioned in either of said Exhibits, and in the second breath maintain to this very date that they had no knowledge of the Second Check being unpaid until February 10, 1967.

Obviously, the two positions are inconsistent, and in fact, mutually exclusive.

If they made payment of money to the bank on January 4, 1967, in discharge of Check Two, knowledge of Check Two and a "plain, definite and certain" offer to discharge it would be an essential element to include it in the accord and satisfaction.

It is impossible to reconcile Lundahl's position in this respect.

The Court's Findings and Conclusions based on the record and the Judgment entered thereon should be upheld.

CONCLUSION

The plain simple facts are that Lundahl wants to keep the bank's money. The lower Court refused to lend its aid to such an unjust enrichment. Respondent earnestly requests this Court to do likewise, and uphold the trial Courts Findings, Conclusions and Judgment.

Respectfully Submitted.

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By .....

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By .....

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